IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-241

COMMUNICATIONS WORKERS OF AMERICA

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISION
JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR
UNITED STATES OF AMERICA
TELEPHONE COORDINATING COUNCIL,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
ALLIANCE OF INDEPENDENT TELEPHONE UNIONS
AMERICAN TELEPHONE AND TELEGRAPH COMPANY *et al.*,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CASES AND AUTHORITIES CITED

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Reports of Opinions Below

The Communications Workers of America, intervenor-defendant and appellant below, petitions this Honorable Court to issue a writ of *certiorari* to review the decision of the Third Circuit Court of Appeals reported at 14 FEP Cases 1210, affirming the decision of the United States District Court for the Eastern District of Pennsylvania reported at 419 F. Supp. 1022, 13 FEP cases 392, which denied the peti-

tions and motions of three Union intervenors to modify the Consent Decree reported at §431 FEP Manual p. 73, and directed entry of a Supplemental Order, §431 FEP Manual p. 124a.

Basis of Jurisdiction

(a) The judgment of the Third Circuit was entered on April 22, 1977. The Court's opinion was filed the same day.

(b) The appellants' Petition for Rehearing and Suggestion for Rehearing *In Banc* was denied on May 16, 1977.

(c) This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1254:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of *certiorari* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;" . . .

Constitutional Provisions, Statutes and Regulations

The following Constitutional Provisions, Statutes, Executive Order and Regulations involved in this case are set out at length in the appendix:

Constitution of the United States, Amendment V, Amendment XIV

The Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 259,

Sections 703 (a) 42 U.S.C. §2000 e-2 (a)
703 (h) 42 U.S.C. §2000 e-2 (h)
703 (j) 42 U.S.C. §2000 e-2 (j)
706 (g) 42 U.S.C. §2000 e-5 (g)

Executive Order 11246, dated September 24, 1965, 30 F.R. 12319

Revised Order 4, 41 CFR 60.2-24

Questions Presented for Review

1. May an employer, pursuant to a court consent decree to meet a charge of discrimination on account of race, color, sex and national origin, agree to an Affirmative Action Plan which provides through reverse discrimination for violation of the seniority rights of employees under a *bona fide* collective bargaining agreement, and to override such seniority rights for the purpose of meeting goals, quotas and time tables established by such Affirmative Action Plan?

2. Is relief under Section 706(g) of the Civil Rights Act of 1964 available only to identifiable victims of discrimination, or may such relief be ordered in favor of all members of an underutilized class without regard to prior employment status or actual discrimination?

3. Is a contractual promotion plan calling for promotion of the best qualified applicant, and for selection between equally qualified applicants on the basis of seniority, where there is no evidence of discriminatory intent in the creation or application of the plan, a *bona fide* seniority or merit system protected by Section 703(h) of the Civil Rights Act of 1964?

4. Is it a violation of Section 703(a) of the Civil Rights Act of 1964 for an employer, who may not be required to grant preferences in promotion and transfer to achieve racial, sexual and ethnic balance between its work force and the available work force in its community under Section 703(j) of the Civil Rights Act of 1964, nevertheless to enter into a voluntary agreement to grant such preferences in violation of its contractual obligations under the applicable collective bargaining agreements, over the objections of the collective bargaining representatives?

5. May an employer, who is also a government contractor, be required under Executive Order 11246 to grant preferential treatment to its employees on the basis of race, sex or national origin, when such a preference would otherwise be proscribed by Section 703(h) and (j) of the Civil Rights Act of 1964, as amended?

6. Is it a violation of the Constitution of the United States for an employer and the United States Government to enter into a consent decree requiring promotion and transfer of employees on the basis of race, sex or national origin without regard to whether or not the beneficiaries of such preference are actual victims of prior discrimination?

Statement of the Case

On January 18, 1973, the Equal Employment Opportunity Commission, the Secretary of Labor and the Department of Justice filed suit against the American Telephone and Telegraph Company and twenty-four of its operating subsidiaries or affiliates in the United States District Court for the Eastern District of Pennsylvania under Title VII of the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. §2000 e, Executive Order 11246, dated September 24, 1965, 30 F.R. 12319, and the Fair Labor Standards Act, as amended, 29 U.S.C. §201 *et seq.*, charging unlawful discrimination on the basis of race, sex and national origin in violation of the applicable provisions of those statutes and order. The defendants filed an answer the same day denying any infractions, and the Court approved a Consent Decree which had been negotiated between the Government agencies and the American Telephone and Telegraph Company over the previous months, with minimal union participation. The Union petitioners were not then and have never been parties to the Consent Decree.

The Consent Decree (Sec. I and II) required the AT&T defendants to adopt and implement an affirmative action program under which goals and timetables would be established for fifteen classifications of management and non-management employees in each employing company. These goals and timetables were to be accomplished over the six year life of the decree to reach a parity or balance between the racial, sexual and ethnic composition of employers' work force and the racial, sexual and ethnic composition of the available labor market in each geographical area serviced by the employer. This balance was to be achieved by hiring preferences in the entry level jobs, and by preferences on the basis of race,

sex or national origin in promotion and transfer above the entry level. The latter preferences were to be granted without regard to, and in spite of, the employers' contracts with the Communications Workers of America (hereafter CWA) and other labor organizations representing their employees. These contracts generally called for promotion of the best qualified applicant, and, if qualifications were substantially equal, selection between equals on the basis of seniority.

It is this "Affirmative Action Override" of the contractual promotion provision which makes this Consent Decree offensive to the Union, and in its opinion, constitutes an improper and illegal device to remedy the effects of past discrimination.

On February 9, 1973, CWA petitioned the District Court for leave to intervene, to set aside and enjoin the Consent Decree. Leave was denied as to all but the limited issue of maternity benefits, 365 F. Supp. 1105. On appeal, the Third Circuit granted CWA the right to intervene as a party defendant "in order to seek modification of the Consent Decree insofar as the decree modifies or invalidates the provisions of CWA's collective bargaining agreements with AT&T, and impairs or impedes CWA's ability to enforce or protect those provisions." 506 F. 2d 735.

Upon remand, CWA and the other unions representing defendants' employees were granted intervention and all filed motions or petitions to modify or set aside the provisions of the Consent Decree in conflict with their contractual provisions regarding promotion and transfer, and to bring the Consent Decree into line with the prior decisions of this Court and several Courts of Appeal. These motions were all denied by the District Court, A. Leon Higginbotham, Judge, and a supplemental order was entered at the request of the Government. 419 F. Supp. 1022, 13 F.E.P. Cases 392. The denial was affirmed by the Third Circuit, and after reconsideration or rehearing *in banc* was denied, this petition followed.

The Government's original complaint alleged, and the affidavits submitted later tended to support the proposition

that until the late 1960's, following passage of the Civil Rights Act of 1964, the defendants' policy was, with few exceptions, to hire male employees into the craft jobs in the Plant Department, and then hire females into the operator, accounting and clerical jobs in the Traffic, Accounting and Commercial Departments. The plant jobs generally had higher starting salaries and a higher progression schedule than the other departments. Transfers and promotions from the other departments into the Plant Department were infrequent, because incumbents in traffic, accounting and commercial did not develop the technical craft skills to qualify and compete with Plant Department incumbents. In the Bell System, both competitive and benefit seniority are on a company-wide basis. There are no departmental or craft seniority lines. There has been no allegation or suggestion by any party at any phase of these proceedings that the contractual promotion and transfer provisions were adopted with the intention to discriminate.

The relief under Sections I and II of this Consent Decree and the Supplemental Order is not limited to identifiable victims of discrimination, but extends to all members of "underutilized" racial, sexual or ethnic groups. "Underutilized" in this context means that there is an imbalance in a particular job classification between composition of the employers' work force and the racial, ethnic and sexual composition of the available labor market, such that the proportion of employees in the "underutilized" group is less than the proportion of that racial, sexual or ethnic group in the general labor market. There is no requirement that the beneficiary of the preference be an actual victim, or even have been an employee at the time some alleged discrimination occurred. The purpose of the affirmative action program is not to identify and compensate victims, but to balance the racial, sexual and ethnic composition of the work force.

On the other hand, Section III A. provides *competitive* relief to specific identifiable employees, i.e., females and minority workers with four years of net credited service on July 1, 1971. The relief is waiver of the "best qualified" criterion.

If they apply for a semi-skilled craft job, they are permitted to *compete* for that job on the basis of *basic* qualifications and net credited service. That is, as between the best qualified applicant and another applicant who was a female or a minority group member, and who had four years' service on July 1, 1971, and who possessed basic qualifications, the vacancy would be filled by the senior employee. The decree also provided for a promotion pay plan to compensate for differences between the wage progression schedules of Plant Department and other jobs (Section VI), a plan for limited retroactive pay adjustments, and for bonuses in lieu of back-pay for those employees with four years' service on July 1, 1971, who are promoted to craft jobs between June 30, 1971 and July 1, 1974, and who remain in a craft job for six months (Section VIII). Sections IIIA, VI and VIII of the decree are attempts to locate identifiable employees in their rightful place in the competitive structure by imputing to them the experience they would have gained had they been hired into the Plant Department originally, and then allowing them to compete on the basis of seniority, with compensation, albeit inadequate, in lieu of back pay.

Sections I, II and IIIB of the Consent Decree, and the Model Affirmative Action Program, Upgrading and Transfer Plan and Job Briefs and Qualifications, (Exhibits A, B and C to the Consent Decree) had been interpreted and applied by the Government plaintiffs and AT&T defendants to require that members of underutilized groups who possess basic qualifications must be promoted or transferred, or even hired off the street without regard to whether or not they were prior victims of discrimination, and without regard to competitive seniority except with other members of the underutilized group. A certain percentage of vacancies in each classification is set aside for bidding only by members of underutilized groups, and applications from members of other groups are not even accepted or referred to the selecting official. This is further reflected in the absolute "front-load" preferences established by the Supplemental Order, and by the interpretation accorded to the Consent Decree by the Supplemental Order, Section IV.

Reasons for Granting the Writ

1. The decision of the Third Circuit is in direct conflict with the decisions of this Court in *International Brotherhood of Teamsters* v. *United States,* ..... U.S. ....., 45 U.S.L.W. 4506, 52 L. Ed. 2d 396, 97 S. Ct. ..... (May 31, 1977), *Trans World Airlines* v. *Hardison,* ..... U.S. ....., 45 U.S.L.W. 4672 (June 16, 1977); *United Air* Lines v. Evans, ... U.S. ....., 45 U.S.L.W. 4566, 52 L. Ed. 2d 571, 97 S. Ct. ..... (May 31, 1977); *Franks* v. *Bowman Motor Transport,* 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976) and *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 96 S. Ct. 2574, 49 L. Ed. 2d 493. (1976).

The Third Circuit's opinion was issued in April, and rehearing was denied May 16, 1977. This Court's decisions in *Teamsters* and *United Air Lines* were issued May 30, and *Hardison* on June 16, 1977. These decisions established for the first time that *bona fide* non-discriminatory merit and seniority systems are protected by Section 703(h) of the Civil Rights Act of 1964. They further clarified and emphasized that *Franks,* in according seniority relief to identifiable victims of discrimination, required only that the beneficiaries be restored to their rightful place within the lawful system, and not that the entire system be dismantled, redesigned, or overridden.

The very points upon which the Supreme Court decided these cases had been argued to the Third Circuit and rejected by it in summary fashion (App. 14a). Obviously, the Court of Appeals was wrong in the light of hindsight, and it would be tempting to vacate and remand, for reconsideration in light of *Teamsters,* etc. This, however, would only postpone the inevitable and multiply the appeals, since regardless of the outcome of the Title VII issues, this Court would still be petitioned at a later stage to decide the issues under the Executive Order and equal protection of the laws.

These are important issues which cannot be avoided, and this case is the perfect vehicle for deciding them. There are no factual disputes, only pure questions of law.

2. The decisions in *Teamsters* v. *U.S., supra,* and *Franks* v. *Bowman, supra,* both involved the relief available to identifiable applicants under Title VII of the Civil Rights Act of 1964. In *Teamsters* this Court went to great pains to point out that the affected discriminatees included not only actual applicants, but those who would have applied had they not felt it a fruitless gesture. However, there is no suggestion preferences should also be accorded to persons who never applied for transfer or who were not discouraged from applying. On the contrary, this Court says:

> ". . . Sec. 703(j) makes it quite clear that Title VII imposes no requirement that a work force mirror the general population . . . (Footnote 20)
>
> "(Section 703(j)) provides only that Title VII does not require an employer to grant preferential treatment to any group in order to rectify an imbalance between the composition of the employers workforce and the makeup of the population at large . . . To allow identifiable victims of unlawful discriminations to participate in a layoff recall is not the kind of 'preference' prohibited by Sec. 703(j)." (Footnote 61)

However, because the litigants in *Teamsters* and *Franks* were all actually or potentially identifiable victims of discrimination, the Government parties have refused to concede that Sec. 703(j) limits the remedial power of a court under Sec. 706(g) to identifiable victims and proscribes group relief.

The present case presents a perfect vehicle for laying to rest the question of whether relief under Title VII is limited to identifiable victims, because there are two classes of beneficiaries of relief: (1) There is the specific relief accorded to those who were arguably actual victims of discrimination (Sec. III A, VI and VIII), and (2) general relief to racial, sexual or ethnic groups without regard to actual prior discrimination, in order to achieve a balance with the makeup of the general population. (Sec. I, II and III B)

The Third Circuit, in reaching its conclusion that the remedial power is not limited to identifiable victims, but that

"class relief, without regard to the victim status of every class member, is appropriate" was reinforced "by the firm consensus in the Courts of Appeals upon the lawfulness of class-based hiring preferences and membership goals." There is no Supreme Court authority cited. It is an open issue in this Court, and a very important one, as to whether or not a District Court may order group preferences without regard to actual victim status in order to achieve racial, sexual or ethnic balance in the workforce. Put another way, may a District order racial, sexual or ethnic quotas to achieve such a balance, or is it limited to equitable relief to make whole the actual identifiable victims?

3. As cited above, this Court twice noted in *Teamsters* that under Section 703(j) an employer cannot be *required* to give preferential treatment to certain employees over others to achieve racial, sexual and ethnic balance in its workforce. The present case goes a step farther, however, for it involves a consent decree by which several employers voluntarily *agreed* to grant such preferences in violation of their collective bargaining agreements and without the consent of the unions, and the Court ratified the agreement.

Teamsters also decided that a *bona fide* seniority or merit system not established with the intention to discriminate, is protected by Section 703(h) even though the effect may be to perpetuate the effects of past discrimination. Without conceding the latter effect, it is nevertheless clear that the contractual promotion and transfer plans in effect between these employers and their unions were *bona fide* and not intended to discriminate.

> "Thus, absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."
>
> *Trans World Airlines v. Hardison,* 53 L. Ed. 2d at 130.

> "Post-act discriminatees, however, may obtain full 'make whole' relief, including retroactive seniority under *Franks* v. *Bowman, supra,* without attacking the legality

> of the seniority system as applied to them. *Franks* makes it clear . . . that retroactive seniority may be awarded as relief from an employer's discriminatory hiring and assignment policies even if the seniority system agreement itself makes no provision for such relief." 424 U.S. at 778-779.
>
> *Teamsters* v. *United States,* 52 L. Ed. 2d at 422.

Applying those principles to the present case, we see that if the relief had been limited to Sections III A, VI and VIII of the Consent Decree, there could be little ground for appeal. These sections grant remedial relief and compensation to identifiable discriminatees within the existing promotion and transfer procedures, in a sincere attempt to put them in the approximate "rightful place" in the competitive structure. *Teamsters, supra; Franks, supra.*

Unfortunately for about 700,000 union-represented employees of the Bell System, the employers did not stop there. They went further and agreed to Sections I, II and III B and the appendices, which provide for override of the contractual selection system based on merit and seniority by a preference system based on race, sex and national origin. It is clear to CWA that its contractual systems were *bona fide* and protected by Section 703(h) from interference by the courts, except to the limited extent necessary to grant remedial relief to identifiable victims. It is extremely important, however, to settle the question which has not been previously settled by this Court, namely, may the employer enter into an agreement with a government agency to abrogate and override a protected promotion plan over the objections of the employee representative, the union, and may a District Court ratify and enforce such a contract?

If the promotion provisions in question were illegal in some way, there could be justification or excuse for the employers' actions. But these merit and seniority provisions are not only not illegal, they are specifically protected by Section 703(h). According to the employers' own figures, the contractual promotion procedure was "overridden", i.e. breached or ignored, 28,856 times in the first two years of the decree's life.

There are thousands of contract arbitration cases noticed for arbitration but being held in abeyance pending the outcome of this litigation. Thousands of lives have been affected. Thousands of employees want to know if their employer can, with impunity, sign away their "legitimate expectations" embodied in the labor agreements negotiated by their collective bargaining representative.

The Unions have been castigated by the lower courts for refusing to participate in the negotiation of the Consent Decree. It turns out now the Unions were right in refusing to consent to modification of their *bona fide* merit and seniority systems. They have been fighting for five years to have this Court say that AT&T had no right unilateraly to abridge its contracts and substitute another promotion plan based on race, sex and national origin for the *bona fide* seniority and merit plans in their contracts, and that the District Court which blessed AT&T's actions was wrong to do so.

4. The Court of Appeals, relying upon its own decision in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F. 2d 159 (3rd Cir. 1971) held that Executive Order 11246 was itself alone a valid basis for class relief, "entirely apart from Title VII", since "it is undisputed that the Bell System is a major governmental contractor."

There is no Supreme Court case on the interrelationship of Executive Order 11246 and Title VII. The Third Circuit apparently feels that whatever limitations may apply to the remedial power of the Court under Title VII do not apply when the case is brought under Executive Order 11246; that by becoming a government contractor subject to Executive Order 11246 an employer surrenders, for himself, his employees and their union, all protections of their negotiated promotion and transfer system based on merit and seniority, all injunctions against racial, sexual and ethnic preferences to meet pre-established quotas, and all rights to a balancing of the equities, including the legitimate expectations of innocent co-workers.

The law of equality in employment opportunity has been

set by Congress in the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972. The equal protection concent of the Fourteenth Amendment, incorporated in the Fifth Amendment to the Constitution, is also a restraint upon Federal Government activities, and a limitation upon the scope of the Executive Order.

The Third Circuit said in this case:

> "In *Contractors Association of Eastern Pa.* v. *Secretary of Labor,* 442 F. 2d 159 (3rd Cir. 1971), we held that the Executive Order was a valid effort by the government to assure utilization of all segments of society in the available labor pool for government contractors, entirely apart from Title VII. Certainly that broader governmental interest is sufficient in itself to justify relief directed at classes rather than individual victims of discrimination."

The provisions of Executive Order 11246 in this regard are:

> "Sec. 202. . . . (A)11 government contracting agencies shall include in every Government Contract hereafter entered into the following provisions:
>
> "During the performance of this contract, the contractor agrees as follows:
>
> "(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, promotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship". . .

It would seem obvious from reading the text of the Executive Order that the broad governmental objective sought to

be attained by that order is that "employees are treated during their employment without regard to their race, color, religion, sex, or national origin", in all matters including transfer and promotion. The court does not explain how this governmental purpose is carried out by an order requiring promotion and transfer in many cases solely on the basis of sex, race or national origin, and the establishment of class preferences.

The provisions of the Consent Decree dictating and requiring preferential treatment of employees in promotion and transfer appear to contradict the explicit language of the very Executive Order they are allegedly intended to implement. Moreover they are inconsistent with Revised Order 4, 41 C.F.R. 60.2-1 *et seq.*, the implementing regulations issued by the Secretary of Labor:

> "41 C.F.R. 60.2-24 *Development and Execution of Programs*
>
> ". . . (f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:
>
> ". . . (5) Make certain 'worker specifications' have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent).
>
> ". . . (8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are non-discriminatory and do not have a discriminatory effect."

There is nothing, repeat *nothing*, in these regulations which requires racial or sexual preferences in promotion or the override of a non-discriminatory promotion system. The sections quoted above indicate that what is required of the contractor is promotion on the basis of basic qualifications and net credited service. This is what the unions sought in their Petition to Modify the Consent Decree, and this is what the Third Circuit peremptorily denied.

This Court has never ruled upon the scope of relief available under Executive Order 11246 and Revised Order 4. The petitioner feels strongly that the present decree is inconsistent with Presidential purpose and policy and exceeds the authority delegated by Executive Order 11246. The writ should be granted to set the parameters of relief available under Executive Order 11246.

5. The concept of equal protection of the laws, contained expressly in Amendment XIV to the Constitution of the United States, is contained implicitly in the Due Process clause of Amendment V, as a brake on Federal activities. *Bolling* v. *Sharpe*, 347 U.S. 497, (1954)

This Court has found that classification based on race, *McLaughlin* v. *Florida*, 379 U.S. 184, (1964) alienage, *Graham* v. *Richardson*, 403 U.S. 365 (1971) and sex, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) are inherently suspect, and must survive "strict scrutiny" to be constitutional.[1]

The Consent Decree and Supplemental Order cannot survive such scrutiny. They establish racial, sexual and ethnic quotas which must be filled within a specified time frame. Until they are filled, applications from members of unfavored groups are not even referred to the appointing authority. It cannot be argued that this preference scheme bears a rational relationship to a legitimate legislative purpose, since the Congress in Section 703(j) specifically proscribed class relief of this nature to achieve balance in the workforce. Neither is it the least burdensome way of accomplishing the policy objective. Perhaps it is easiest for the government or the employer, but it has imposed the burden of reverse discrimination and interference with the legitimate expectations upon almost 29,000 employees in the first two years of operation. The government interest in integrating the work force is not so urgent and compelling that principle must be sacrificed to expediency.

There are many reported decisions of lower courts sus-

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[1] Cf. *Califano* v. *Goldfarb*, ... U.S. ....., 97 S. Ct. 1021, 51 L. Ed. 2d 270 (1977); *Craig* v. *Boren*, ... U.S. ....., 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976).

taining the constitutionality of preferences in *hiring* for minority groups when no innocent party is being deprived of vested benefits, or in promotion and transfer when the preferred individuals are identifiable victims of prior discrimination and the preference is necessary to equalize position. Even many of these cases reflect the hesitancy of the Courts to enter this area. See, e.g. *Carter* v. *Gallagher,* 452 F. 2d at 328-30:

> ". . . However, in dealing with the obstruction of employment as a class (as distinguished from identifiable discriminatees) we are confronted with the proposition that in giving an absolute preference to a minority as a class over those of the white race who are either superiorly or equally qualified would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution . . ."

Most recently, the Court of Appeals for the Second Circuit found that the imposition of racial quotas for promotion "is constitutionally forbidden reverse discrimination." *Kirkland* v. *Department of Correctional Services,* 520 F. 2d 420 (2d Cir. 1975) *cert.* den. 429 U.S. 823, 50 L. Ed. 2d 84 (1976).[1]

In the present case, the Court of Appeals for the Third Circuit compared the governmental interest in having all groups fairly represented in employment with the state's interest in the qualifications of lawyers, *In re Griffiths,* 413 U.S. 717, and found

> "(It) is at least as substantial, and since that interest is substantial the adverse effect on third parties is not a constitutional violation. Moreover, the same exclusion of such members could conceivably result from remedies afforded to individual victims of discrimination. This remedy operates no differently. Furthermore, as

[1] While recognizing "particularly sensitive issues of doctrine and policy," this Court has been "wholly content to leave this thorny question until another day." *United Jewish Organizations of Williamsburgh* v. *Carey,* ..... U.S. ....., 97 S. Ct. 996, 51 L. Ed. 2d 229, (1977) (Brennan, J. concurring)

> noted above, the affirmative action override is necessary to the practical accomplishment of the remedial goal."
>
> (App. 27a-28a)

The court does not mention or attempt to distinguish *Kirkland.* Rather it seems to be saying that the governmental interest in balancing the work force is so substantial as to override all constitutional objections. On the contrary, the demonstrated governmental policy in Section 703(j) of the Civil Rights Act is against quotas to balance the workforce. *Teamsters, supra.*

Moreover, the court fails to recognize that Sections III A, VI and VIII of the decree afford relief to the identifiable victims, and that the remedy ordered by Sections, I II and III B, the affirmative action override, is completely over and above the relief to identifiable victims. It also fails to distinguish between "rightful place" relief to identifiable victims, and absolute preferences in selection based solely on race, sex or national origin.

This Court should grant *certiorari* to reconcile the apparent conflicts between this case and *Kirkland* v. *Department of Corrections, supra,* and to clarify once and for all the constitutional limitations upon remedial relief in the equal employment area, in terms of identifiable discriminatees vs. group preferences, and "rightful place" competitive relief vs. absolute front load preferences.

Conclusion

This Court should grant this Petition for Writ of *Certiorari* for the following reasons:

1. The decision of the Third Circuit Court of Appeals is in conflict with decisions of this Court regarding the interpretation and application of Title VII of the Civil Rights Act of 1964, as amended.

2. This case presents substantial questions of federal law which have not been settled by this Court, concerning

(a) The authority of a United States District Court

under the Civil Rights Act of 1964, as amended, to order group preferences based on race, sex or national origin without regard to actual victim status to achieve racial, sexual or ethnic balance in the workforce.

(b) The scope of relief available under Executive Order 11246, and the limitations placed upon such relief by constitutional considerations of equal protection and by the Civil Rights Act of 1964, as amended.

(c) The authority of a United States District Court to enter judgment upon a Consent Decree requiring the employer to take remedial actions which would have been beyond the Court's authority to order in the absence of the consent, and which require the employer to breach its collective bargaining agreements, and to override a *bona fide* seniority or merit system without the consent and over the objections of the collective bargaining representatives.

3. The decision of the Third Circuit in this case is in conflict with the decision of the Second Circuit in *Kirkland* v. *Department of Correctional Services,* 520 F. 2d 420, *cert.* den., on the issue of the constitutionality of racial, sexual and ethnic quotas for promotion, an important question of federal law which has not been, but should be, settled by this Court.

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APPENDIX

Text of Relevant Constitutional Provisions, Statutes, Executive Order and Regulation

Constitution of the United States

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII, Civil Rights Act of 1964, Public Law 88-352 §703, 78 Stat. 255 as amended by Public Law 92-261, 86 Stat. 103 Codified at 42 U.S.C. §2000 e-2:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or

applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

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Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account

of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. 2000e-5 (§706):

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimi-

nation on account of race, color, religion, sex, or national origin or in violation of section 2000-3e(a) of this title.

Executive Order 11246, 30 FR 12319, as amended by Executive Order 11478:

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

Subpart A—Duties of the Secretary-of-Labor

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

Subpart B—Contractors' Agreements

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting

officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contacting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by

rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

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Subpart D—Sanctions and Penalties

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary of the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

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Revised Order 4, 41 CFR 60-2.24:

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and workstudy programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither mi-

norority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparently qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are nondiscriminatory and do not have a discriminatory effect.